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SUPREME COURT, U.S.

No. 187

# Supreme Court of the United States

WILLIAM E. BODE, *et al., Plaintiffs-Appellants,*

*vs.*

EDWARD J. BARRETT, as Secretary of State of the State of Illinois, *et al., Defendants-Appellees.*

**Appeal from the Supreme Court of Illinois.**

## BRIEF OF PLAINTIFFS-APPELLANTS IN ANSWER TO STATEMENT OF APPELLEES OPPOSING JURISDICTION AND IN ANSWER TO MOTION OF APPELLEES TO DISMISS OR AFFIRM.

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July 8, 1952.

# Supreme Court of the United States

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### INTRODUCTION.

The statement of appellees opposing jurisdiction makes a very incomplete summary of the position of appellants and considerable additional background is necessary to demonstrate the importance and the novelty of the questions presented by this appeal. However, appellants will first refute directly and in order the three positions asserted by appellees and will thereafter briefly comment upon the general aspects of this case.

## REFUTATION OF POSITIONS TAKEN BY APPELLEES.

### I.

### A.

**Appellees' Statement That Each of the Appellants Is Engaged Solely in Intrastate Operations Wholly Within the State of Illinois is:**

**(1) Plainly Erroneous in Fact.**

**(2) Plainly Based Upon a Misconception of the Law Applicable.**

### (1)

### Some of Appellants Are Engaged in Interstate Operations.

(a) MANFORD MCPHERSON, pla' tiff-appellant, testified in part as follows:

> "I operate throughout the State of Illinois under a local carrier permit, specialized carrier permit, and merchant permit; we haul quite a bit of livestock to the Chicago Market and East St. Louis market *and some to St. Louis;* it is a seasonal hauling, but we haul considerable amount of apples and fruit, *some of which will go out of the State;* farm to market product *and it isn't passed by the Interstate Commerce Commission because it is farm to market"* (Record, p. 191, Abst. 79) and
>
> *"My transportation of cattle and hogs is either Chicago or St. Louis"* (Record, p. 196, Abst. 81).

(b) BUELL FORD, plaintiff-appellant testified in part as follows:

> "Q. What are the facts if any which would restrict the passing of any increase in rates? A. Well we have the farmers who use some of their trucks. Then we have the railroad companies, the G. M. & O. and the C. B. & Q.

"Q. Is there any competition from the neighboring states such as Missouri and Iowa? A. The Missouri trucks operate out of the St. Louis stock yards on the return of cattle and stuff like that. (Record 199, Abst. 82, 83.)

"Q. Individual owners would have to pay the same license fee for the same type of equipment would they not? A. We do hauling for farmers. They do their own work, yes, sir.

"Q. They have to pay a license fee for a truck at the same rate you pay? A. *But they hire you to haul to St. Louis and Chicago.*" (Record, p. 200, Abst. 83.)

**(2)**

**Appellees' Position in the Matter of Questions of Interstate Commerce Is Plainly Based Upon a Misconception of the Law.**

**While Plaintiff-Appellants Have Shown in (1) Above That Defendants-Appellees Are Simply Wrong in the Statement of Fact As to the Two Plaintiffs Noted, the Issue Is Much Broader Than That.**

**(a) Illinois residents have just as much right to complain of a burden upon interstate commerce imposed by the State of Illinois as do residents of any other state.**

The question is simply whether the commerce is burdened. While many other aspects of the burden are charged in the complaint and considered in the opinion of the Supreme Court of Illinois, the point made above is directly charged in paragraph 12 (b) of the complaint (Record 21, Abst. 16).

"The operation of the tax on 'resident' owners discriminates in favor of 'non residents' in interstate commerce where the state of the 'non-resident' exempts Illinois residents from its taxes."

Again in paragraph 9(b)(4) of the complaint (Record, p. 18, Abst. 13).

"Non-resident owners, where exemptions are given to Illinois residents, * * * may use the highways with the maximum permissible axle loads without payment for use e.g., *a St. Louis Missouri resident may operate between St. Louis and Chicago paying no tax. The same operation by a resident on the highest classification is $1,588.00 per truck. The basis is therefore 'ownership' by 'residents' and not 'use'.*"

**(b) In this suit all taxpayers of Illinois are actual plaintiffs and the settled Illinois law permits challenge based upon evidence concerning those who do not actually appear and complain and the evidence clearly introduces varied situations in respect to the effect upon interstate commerce and this was considered by the Supreme Court of Illinois for the purpose of final decision in all respects as if these parties whose records were introduced were plaintiffs.**

The decree of the Circuit Court of Sangamon County, Illinois contains the following (Record 64, Abst. 27):

"The Court further finds that this suit is properly brought in behalf of all citizens and taxpayers of the State of Illinois, that all such citizens and taxpayers are parties to this cause by virtue of the doctrine of class representation *and that all of them are bound by and entitled to the benefits of this decree.*"

The Supreme Court of Illinois recognized and used this evidence as follows (*Bode* v. *Barrett*, 412 Ill. 204 on 212 and 213):

"The plaintiffs introduced in support of their contentions the testimony of several truck operators of various classes *and a large volume of documentary evidence.* * * * To establish the low annual mileage of private and local carriers, the plaintiffs first introduced records of about ten operators in each of five different classes who had been operating under the mileage weight option showing an average annual mileage per private carrier of 3082 miles. The mile-

age records of several other truckers operating under the mileage weight option were also introduced, including those of 25 Chicago coal companies operating 108 trucks showing an annual average of 4232 miles per truck, and *eight interstate truckers records were introduced.* * * *"

By way of illustration certain of this evidence to which the Supreme Court of Illinois referred was as follows (taken from p. 20 of plaintiffs' brief, record reference here added):

"INTERSTATE MILEAGES

"The annual mileages for one truck traversed by typical Illinois truckers in interstate commerce are herewith shown:

| Name | Illinois Mileages | Mileages Outside of Illinois | Abst. Ref. | Record |
|---|---|---|---|---|
| Loren Frederick | 10,442 | 68,283 | 137 | 313 |
| Richard C. Beachdel | 1,190 | 50,830 | 137 | 313 |
| Michael Krause | 882 | 27,675 | 137 | 313 |
| Ben Booker & Sim Booker | 899 | 39,644 | 138 | 314 |
| Harold Thibo | 1,480 | 57,400 | 138 | 314 |
| Lyle Thompson | 2,468 | 49,173 | 138 | 314 |
| George O. Thompson | 2,534 | 42,082 | 138 | 314 |
| Prentice Thomas | 2,232 | 51,171 | 138 | 314 |
| George O. Thompson | 2,123 | 33,992 | 138 | 314 |
| Paul F. Bestick | 6,756 | 62,473 | 138 | 314 |
| Robert Turner | 2,041 | 57,442 | 138 | 314" |

The foregoing is only a portion of the record devoted to this subject.

While of course the State of Illinois takes judicial notice of the laws of other states adjoining Illinois plaintiffs introduced exhibits setting forth vehicle license fees. Plaintiffs' Exhibit 79 Indiana, 80 Wisconsin, 81 Missouri and 82 Iowa. (Record, 374-400, not set forth in the abstract.)

The Supreme Court of Illinois held that the question of burden on interstate commerce was in issue in this case. *Bode* v. *Barrett*, 412 Ill. 204 on 208 and last par. 209. Also on p. 233 last paragraph which will be referred to under Points I B and II hereof.

The Supreme Court of Illinois by a curious failure to recognize the fact that in interstate commerce *every citizen has an equal right not to have such commerce itself burdened, said* in *Bode* v. *Barrett,* 412 Ill. 204 on p. 226.

> "If a state may thus tax non-resident owners with respect to interstate commerce, measuring the tax by the value of the privilege granted and disregarding the extent to which the privilege is availed of, *a fortiori* it may tax its own citizens for the privilege of using state highways without regard to how much or how little the licensees actually take advantage of the privilege conferred upon them."

The cases cited by appellees to-wit: *Southern Railway* v. *King,* 217 U. S. 524; *Missouri Kansas and Texas Ry.* v. *Cade,* 233 U. S. 642; *Massachusetts* v. *Mellon,* 262 U. S. 447; *Hendrick* v. *Maryland,* 235 U. S. 610; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583; *Tyler* v. *Judges,* 179 U. S. 405; *Smith* v. *Indiana,* 191 U. S. 138; *McCandless* v. *Pratt,* 211 U. S. 437; and *Miles* v. *Department of Treasury of Indiana,* 298 U. S. 640 are therefore all inapplicable upon the two grounds that,

(a) Some of the plaintiffs here are actually engaged in interstate commerce and claim a burden.

(b) The Supreme Court of Illinois has thoroughly considered the question and decided the issue on the basis of evidence submitted and the case is binding on Illinois residents and taxpayers engaged in interstate commerce.

## I B. and II.

### Appellees Completely Misconceive and Under Point I B Misstate the Position of Appellees as to the Asserted Burden Upon Interstate Commerce.

(1) On page 4 of appellees' statement appears the following:

> "There is no constitutional requirement that a difference in rate be made between the two classes of

carriers" (i.e. line haul carriers for hire and private truck owners).

At no point have plaintiffs-appellees made this contention. To use a popular phrase this issue claimed by appellees is simply a "straw man."

Plaintiffs-appellants do contend and the evidence so demonstrates and the Supreme Court of Illinois recognizes that there is an actual division of use.

*Plaintiffs-appellants' position however is simply that the tax imposed bears no fair relation to the privilege granted.*

First, there is no doubt that the Supreme Court of the United States has held repeatedly that a tax on interstate business must bear some fair relation to the use of the highway. *This is not some fiction of aggregate charges to all trucks intrastate and interstate and aggregate costs of the state.*

Second, there is no doubt either that the Supreme Court of Illinois in the case at hand (*Bode* v. *Barrett*, 412 Ill. 204) means by its decision that the only test is whether aggregate charges to all trucks equal aggregate expenses for highways.

As to the *first* point above the following from *Interstate Transit Co.* v. *Lindsey*, 283 U. S. 183 on p. 190 is squarely in point.

> "But since a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the state. *Clark* v. *Poor*, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702, *supra*. In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled or even with the number of passengers actually carried on the highways of the state. Nor is it related to the degree of

> wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity to the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses. We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory.

"Reversed."

That a flat tax of over $1,000 on a truck that travels 1,480 miles in Illinois and 57,400 outside Illinois in a year (Record 314) bears no reasonable relation to use of the highways, when the same tax is imposed on intrastate operations by one truck or by an average of a fleet of trucks of 68,000 miles a year on Illinois roads (Record *364*) is beyond dispute.

In point is the following from *Sprout* v. *South Bend*, 277 U. S. 162 on 170.

> "A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways."

Also in point is the language of the concurring opinion in *McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 174 on 181:

> "It must appear on the face of the statute or be demonstrable that the tax as laid is measured by or has some fair relationship to the use of the highways for which charge is made."

Plaintiffs-appellants do contend that a private truck owner has a right to use the highway whereas the carrier for hire has a qualified right to use the highway.

*Elkins* v. *Schaaf*, 4 Wash. 2nd 12, 102 Pac. 230;
*Dixie Ohio Express* v. *State Rev. Com.*, 186 Ga. 228, 306 U. S. 72.
*Stephenson* v. *Binford*, 287 U. S. 251;

Plaintiffs-appellants do contend that a license tax must bear a reasonable relation to the use of the highway.

*State ex rel. Atlantic Greyhound* v. *Mizell*, 128 Fla. 125;
*Interstate Transit Co.* v. *Lindsey*, 283 U. S. 183;
*McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 176.

*Plaintiffs' position is that the right to impose a tax so high as to prohibit use applies to an intrastate carrier for hire only.*

*The use cannot be prohibited to a private trucker and interstate commerce cannot be prohibited.*

When the high flat tax (highest tax here $1,588.00 per truck) reaches a point that private use or interstate use is prohibited it is void. Plaintiffs *admit the tax may be the same if it does not destroy the right of the private truck owner or obstruct interstate commerce.*

The Supreme Court of Illinois considered the privilege of use a privilege without limit ignoring what it had already recognized: that there are the following limitations upon the possibility of use:

(1) Nature of the business.
(2) Legal restrictions on operations.
(3) Division between local and interstate use.

The decision of the Supreme Court of Illinois made the test of reasonableness *solely* the *aggregate charge to all*

*trucks balanced against the cost of maintaining highways.* It said in *Bode* v. *Barrett*, 412 Ill. 204 on p. 255:

> "It cannot be said that a tax on the privilege of using the highways is unreasonably high when that tax does not even equal the total cost of their maintenance."

Plaintiffs' position, to repeat, is that the class of private truck owner and local carrier has a right which cannot be discriminated against or taxed out of existence and so also of interstate commerce. No other case has presented this issue to the Supreme Court of the United States and no state decision has been so sweeping as the one at hand.

The use of the *Mangano* case (*Mangano* v. *Hamilton*, 292 U. S. 40, 78 L. ed. 1109, 54 S. Ct. 599) to justify destruction of interstate commerce is wholly unjustified. (*Bode* v. *Barrett*, 412 Ill. 204 on 226-7). The *Mangano* case, *Veazie Bank* v. *Fenno*, 8 Wall 533, 19 L. Ed. 482 and the *McCray* case, 195 U. S. 27, 49 L. Ed. 78, 24 S. Ct. 769 are all most exceptional cases *and do not purport to define the power of a state to destroy interstate commerce.* Two of the cases are the butter substitute (*Oleo Margerine*) cases. The *Veazie Bank* case is the tax on state bank notes.

The only case that in any remote degree sustains the position of the Supreme Court of Illinois is *Eavey Co.* v. *Dept. of Treasury*, 216 Ind. 255. In that case plaintiff did not question the amount of the tax. The maximum tax there ($400.00) was about one-fourth of the maximum tax here ($1,588.00). The maximum taxes under statutes in cases cited by the Court were $18, $10, $200, 1 cent per mile interstate, $75 (held invalid) $400, $7.50, $75, $25, $15, 2% of value, $70, and $400. *In none of the cases upholding the statute was the amount of the tax questioned;* only the formula or application of the tax was questioned.

With private carriers averaging 4,000 miles as against 60,000 miles for line haul carriers and as against even smaller mileage of interstate carriers in Illinois the tax for the private carrier and interstate carrier is thirty times as

much per mile notwithstanding the private trucker has an absolute right to the road and the line haul carrier (except interstate) may be totally denied the right.

Plaintiffs rely upon:

*Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183;
*Sprout* v. *South Bend*, 277 U. S. 163;
*McCarroll* v. *Dixie Greyhound*, 309 U. S. 176;
*Central Greyhound* v. *Mealey*, 334 U. S. 653;
*Western Livestock* v. *Bureau*, 303 U. S. 250;
*Standard Oil Co.* v. *Peck*, 342 U. S. 382.

It is not our purpose here to show the full application of these cases which can be done only in extended briefs but to show clearly the federal question involved.

To summarize plaintiffs' position is that there is a prohibitive burden upon certain classes of commerce by motor vehicle and discrimination between certain classes of commerce by motor vehicle.

**(2) Section 20 of the 1951 Illinois Motor Vehicle Amendment Both Creates a Burden Upon and Discrimination in Reference to Certain Kinds of Interstate Commerce and Violates the Prohibition Concerning Agreements and Compacts Among the States.**

This section authorizes the Secretary of State to enter into reciprocal agreements with responsible officers of other states where "like privileges" are granted citizens of this state.

The question as here presented has never before been tested.

The Supreme Court of Illinois in *Bode* v. *Barrett*, 412 Ill. 204 held that the section does not:

(1) Impose a burden on interstate commerce (p. 234).

(2) Violate the prohibition against agreements between the states without the consent of congress. (p. 231-34).

*The Appellees in the Supreme Court of Illinois, as here, raised the question whether plaintiffs were in a position to raise the question.*

There are two answers to appellees' position.

*First,* the Supreme Court of Illinois said (*Bode* v. *Barrett,* 412 Ill. 204 on 233).

> "Defendants contend that only non-residents from states that do not have reciprocity can challenge the Act on the ground that it discriminates against them and that none of the plaintiffs are members of this class. This contention is unsound. Where, as here, the suit is brought by a taxpayer under the statute governing injunctive proceedings to restrain disbursement of public moneys (Ill. Rev. Stat. 1951 Chap. 102 Pars. 11-16) we have held that the validity of a statute may be challenged by a taxpayer even though he is not, and does not claim to be, subject to the provisions of the act or to be affected by its provisions except as a taxpayer. *Krebs* v. *Thompson,* 387 Ill. 471."

*Second,* as previously pointed out plaintiffs Manford McPherson and Buell Ford are engaged in interstate commerce. Additionally, the court considered the other documentary evidence and testimony on the question of interstate commerce.

*There Was Introduced in Evidence in This Case the Actual Status of Reciprocity Under the Various Agreements Between the State of Illinois and Other States.*

Plaintiffs' Exhibit 58 is the official compilation for use by the Secretary of State of the State of Illinois and by Motor Users as a guide to administration of the Act. (Record 349, Abst: 185).

The introduction states that it is a guide for enforcement officers.

*The official character and the authenticity of this document is not challenged.*

Various pertinent questions were raised and answered in plaintiffs' brief, pp. 88-94. Here plaintiffs will merely indicate the types of problems presented.

Is the authority of the Secretary of State confined to allowing *all* vehicles from a particular state or refusing *all* vehicles if *all* Illinois vehicles are there exempt? Or may the Secretary of State enter an agreement exempting trucks and taxing trailers? Can the Secretary of State distinguish carriers though the taxing Act itself does not e.g., allow exemption to irregular route operators and disallow to regular route operators?

Plaintiffs' Exhibit 58 shows what agreements have been reached. (Record 349.)

With relation to Arizona there is full reciprocity on passenger cars and no reciprocity on trucks (Ex. 58, p. 7).

With relation to California, there is *full reciprocity for California vehicles in Illinois.* But Illinois vehicles in California must pay *an equalization fee of 3% of gross business done in California.* (Ex. 58, p. 9.)

With relation to Colorado, there is reciprocity on trucks as to license plates only. The flat or mileage tax must be paid. (Ex. 58, p. 10.)

With relation to Iowa there is a division between "Regular Route Operators" and "Irregular Route Operators". The former pay full taxes. The latter have full reciprocity. (Ex. 58, p. 18.)

With relation to Nebraska, there is full reciprocity, *except vehicles burning fuel oil.* The excepted vehicles pay the taxes. (Ex. 58, p. 30.)

With relation to Oklahoma there is full reciprocity on farm trucks, commercial trucks, truck tractors, trailers and semi-trailers.

With relation to South Carolina there is no reciprocity on regular schedule vehicles for hire. There is full reciprocity for irregular operators and operators hauling their own products. (Ex. 58, p. 43.)

With many states there is no reciprocity.

In general there are 17 states which have no reciprocity with Illinois.

So long as Illinois had the mileage weight election (normally used by interstate truckers who had no reciprocity)

prior to the 1951 Illinois Amendment here in question, all hardships which might have resulted were modified by enabling the payment of a tax somewhat apportioned to the use of the highways. The same principle would be true if a gross receipts tax or any tax geared in some fair way to use of the highways were in effect.

While plaintiffs maintain under *Holmes* v. *Jennison*, 14 Pet. U. S. 540 on 571 that the reciprocity agreements are a direct violation of Article I, Section 10 of the United States Constitution, the underlying complaint of course is the burden upon interstate commerce.

Iowa, Missouri, Wisconsin, and Indiana have much lower taxes than Illinois. In fact no state has a tax within hundreds of dollars of the highest Illinois tax. In appropriate briefs charts demonstrating the effect of these differences will be submitted.

The operation is illustrated thus:

A truck owner licensed in a state which has reciprocity with Illinois pays a tax of $200.00 for the regular run from Chicago to St. Louis. An Illinois operator pays $1,000.00 for the same operation in direct interstate competition. An operator from another non-reciprocal state pays the tax of the state of domicile and other taxes en route and the Illinois tax of $1,000.00.

The Illinois Supreme Court cited *Interstate Trucking Co.* v. *Damman*, 208 Wis. 116 and *Brashear Freight Lines* v. *Hughes*, 26 Fed. Supp. 908 as authority to support a section authorizing such agreements. The agreements were not authorized at the time of the *Brashear* case. The *Wisconsin* case is authority for the plaintiffs. There the court said the authority did not necessarily contemplate a contract varying in terms, etc. *Here Plaintiffs' Exhibit 58 demonstrates the actual operation on interstate commerce.* Also the Wisconsin statute prohibited reciprocity agreements on vehicles for hire.

The other authorities cited by the Supreme Court of Illinois to-wit, *Kane* v. *New Jersey*, 242 U. S. 160; *Staraalsi*

v. *Minn.*, 283 U. S. 57; *Hendrick* v. *Maryland*, 235 U. S. 610; *Hicklin* v. *Coney*, 290 U. S. 169; *Capitol Greyhound* v. *Brice*, 339 U. S. 452; *Aero Mayflower Transit* v. *Georgia Public Service Com.*, 295 U. S. 285 are of no assistance in this case. The fees are all much lower or insignificant. The actual effect of interstate agreements was not involved. Discrimination between trading areas was not claimed or shown.

The evidence in this case as to the agreement, the variations in use by classes of user, the arbitrary distinctions between classes of commerce and the extremely burdensome tax distinguish it from anything previously presented to this court.

Plaintiffs earnestly submitted to the Supreme Court of Illinois that the history of the Confederation having been one of tariff walls, competing currencies and export and import barriers was one of the compelling reasons for the change from the Articles of Confederation to the Constitution of the United States.

*All of the Complaints Concerning Trade Barriers and Discrimination in Interstate Commerce Could Be Eliminated by a Tax Which Bears Some Fair Relation to Actual Use of the Highways.*

This requirement is not satisfied by finding that the aggregate of trucks of all kinds pay no more than the aggregate costs of maintaining highways.

## III.

## The Alleged Violations of the Fourteenth Amendment Are Substantial.

While considerable analysis is required to demonstrate the method in which the evidence taken together with recognized principles of law prove the arbitrary character of this legislation, a few may be noted to show the questions involved.

The Supreme Court of Illinois in *Bode* v. *Barrett*, 412 Ill. 204 on 208 and 209 stated the claimed violations of the

Fourteenth Amendment. These pertain to the lack of relation between the tax and the privilege granted, the failure to have any consistent theme of classification, the omission of classes, the confusion of classes and the failure to define terms.

(a) Specifically no tax is provided for a four wheel or two axle vehicle between 30,000 and 36,000 pounds. The Supreme Court of Illinois held in *People* v. *Patton*, 338 Ill. 385 that no conviction could be had for operation of a vehicle without a license where none was provided by the Act. This is therefore an omitted class.

(b) The agricultural exemption is so confusing that it is impossible to determine from the language what the legislature intended. This section after stating that various vehicles used primarily in agricultural pursuits of the owner such as trucks, tractors, trailers, and semi-trailers are exempt says:

> "but nothing in this proviso shall exclude from registration truck tractors, trucks, trailers or semi-trailers engaged in transporting agricultural products."

It is not possible to determine whether any *actual* transportation is taxable or only that by those *engaged in the business* of transporting agricultural products. *The point is not: can you exempt agriculture; but what has the legislature done?*

(c) An equally glaring defect is created by sections 9 (i-3) and 9 (i-4). Section 9 (i-3) provides for 8 or more wheel vehicles over 50,000 lbs. Section 9 (i-4) provides for 10 or more wheel vehicles over 50,000 and under 72,000 lbs. The first section calls for a $1,245.00 tax and the second for a $1,588.00 tax. Any vehicle having ten or more wheels also has eight or more wheels. Any vehicle over 50,000 lbs. and under 72,000 lbs. is also a vehicle over 50,000 lbs. Which tax should a 59,000 lb. 10 wheel vehicle pay? The Courts to which this has been submitted have not attempted to answer the difficulty.

(d) Tables were submitted to show that no consistent theme of classification obtained on weight, wheels, axles or types of vehicles or any combination of the same.

(e) In reference to the contention that "Maximum load" was not defined the Supreme Court of Illinois found that it meant what the owner declared he "intended to carry", which plaintiffs seek to demonstrate, by brief, is untenable.

*It was further contended that the arbitrary character of the Act and the delegation of power has a direct bearing upon the flow of interstate commerce because the arbitrary character of the Act cannot be separated from its effect upon interstate commerce.*

**Conclusion of Response to Statement of Appellees Opposing Jurisdiction.**

The Supreme Court of Illinois has recognized the federal questions involved and has passed upon such questions in a manner binding upon all unless reversed.

The procedure here used is specifically approved by the law of Illinois.

It would be a monstrous result to hold that questions legitimately presented to and passed upon and treated as binding by all should be kept from the tribunal having the final authority by some pretense that the questions were not actually raised.

If more were needed counsel for the appellees have asserted as a matter of record that these federal questions were raised and thoroughly examined by the Supreme Court of Illinois.

*In the case of Coordinated Transport Inc. of Illinois* v. *Edward J. Barrett, et al. No. 32400 in the Supreme Court of Illinois, May Term 1952, the Attorney General of Illinois in the Brief and argument for appellants, pages 8 and 9 says:*

"Here the trial court by its decree found the 1951 Act to be violative of Section 8 of Article I and Sec-

tion 1 of Amendment XIV of the Constitution of the United States * * * a reference to the opinion in the *Bode* case demonstrates that the plaintiffs there specifically assailed the 1951 Act under each of the above mentioned constitutional provisions. *This court* (Supreme Court of Illinois) *after a most comprehensive consideration of all aspects of the Constitutionality of the 1951 Act under both state and federal constitutions concluded its opinion by saying:*

> " 'The Motor Vehicle Law of Illinois as amended is constitutional and the decree of the trial Court is reversed.' "

*No other authority was cited than the case of Bode* v. *Barrett, 412 Ill. 204 to demonstrate that the law did not violate either the commerce clause or the 14th Amendment in the Attorney General's Brief in the Coordinated Transport case above.*

There is no doubt whatever that the case of *Bode* v. *Barrett* (412 Ill. 204) now before this court will be treated as conclusive of the questions presented by this appeal.

*Other Considerations Impelling This Court to Retain Jurisdiction.*

The attempt to mollify the effect of this high flat tax by statement that a consideration of the gasoline tax revenues is pertinent misses the entire effect of the imposition.

The economic effect of the tax is the final test. Plaintiffs agree with the Supreme Court of Illinois that the formula is not important but the effect of the imposition is vital.

A high flat tax economically is comparable to a high rent. A gasoline tax is comparable to an occupation tax measured by sales. One might as well contend that a tax of $1,588.00 to make one sale in Illinois was equalized by the fact that everyone also paid an occupation tax of 2% based on sales. Clearly the more use one can make of the roads in Illinois on a flat tax the less will be his contribution per ton-mile of freight. The theory of $.00251 per ton mile mentioned

by the court obviously cannot apply to a carrier hauling ten tons into Illinois for 1,000 miles at a tax of $1,000.00. Obviously the tax is ten cents per ton mile.

The test is: Will the imposition of the tax create such a burden as to affect the movement of commerce in a substantial way? Will it stop some classes of commerce? Will it favor others?

The Supreme Court of Illinois has chosen to adopt the broadest view possible,—that the state may prohibit commerce by whole classes of carriers. Plaintiffs say this is the very thing the state may not do.

Because of the sweeping decision of the Illinois Court which recognizes the factors and says such factors are immaterial, this Court is asked by the plaintiffs to adhere to the principles formerly announced by this Court and recognized by all that there is a limitation upon the taxing power of the state in such matters and that the fee imposed must somehow be related to the commerce itself and not merely to the total revenue of the state and the total expenditures of the state.

This decision of the Supreme Court of Illinois also approves creation of trading areas within the nation by agreements between the states and the policy therein announced should be corrected by this court. The harmful effects of the abuse of reciprocity would fall away with the adoption of a tax which bears some fair relation to the use of the facility granted by the classes of trade and commerce which use the facility.

In the assignment of errors plaintiffs-appellants suggested that the principles adopted by the Supreme Court of Illinois were so sweeping that the Supreme Court of the United States might find it advisable to reverse and remand to the Supreme Court of Illinois for further proceedings. Plaintiffs-appellants respectfully suggested the precedent of *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, in the event this court should find that by adopting an incorrect

principle, the Supreme Court of Illinois had failed to consider sufficiently the evidence.

Respectfully submitted,

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